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No. 97-0570

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1997

DUCHESNE COUNTY, a political subdivision of the State of Utah, and UINTAH COUNTY, a political subdivision of the State of Utah,
Petitioners,

v.

UTE INDIAN TRIBE, of the Uintah and Ouray Reservation, Utah,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONSE OF THE STATE OF UTAH TO REQUEST FOR STATEMENT OF POSITION

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The State of Utah ("State"), by and through the undersigned counsel of record, submits the following statement of its position in the case described above.

BACKGROUND

The statements of the petitioning Counties and the responding Tribe concerning the history of the subject land, the pertinent statutes, and the lengthy history of litigation on

boundary and jurisdictional issues are accurate and complete and further comment by the State would not be helpful. However, an explanation of the State's past and present stance in the litigation may be useful.

In 1975 the Ute Indian Tribe ("Tribe") adopted a Law and Order Code which extended tribal jurisdiction to the entire original confines of the Uintah and Ouray Reservation. The Law and Order Code thus purported to exert tribal jurisdiction over large areas of land that had passed into non-Indian ownership subsequent to the opening of the Reservation in 1905. Also in 1975 and shortly after adoption of the Law and Order Code, litigation concerning the boundaries of the Reservation was initiated by the Tribe. In various forms and fora, the litigation has continued to the present. The State was a party defendant in the original lawsuit and has been a full participant in that suit and its progeny prior to the instant Writ filed by the Counties. The Utah Attorney General personally presented the State's case to this Court in Hagen v. Utah, 510 U.S. 399 (1994). The State also participated in proceedings subsequent to Hagen before the United States District Court for the District of Utah and the United States Court of Appeals for the Tenth Circuit.

Following the 1997 decision of the Tenth Circuit in Ute Indian Tribe v. Utah, 114 F.3d 1513 (10th Cir. 1997), the Utah Counties of Duchesne and Uintah chose to file the subject Petition for a Writ of Certiorari. The State, however, after carefully considering its options, chose not to seek or join in seeking such a Writ. The State's decision was not made because it was satisfied that the Tenth Circuit decision had satisfactorily or correctly resolved the matter. Rather, the State determined to address the problem through negotiation, not litigation. Twenty-two years in the courts had consumed

resources, nurtured distrust and left unanswered numerous questions which seem to have proven intractable to court-ordered remedies. The Tribe and the Counties have aptly described the present situation as one of "jurisdictional chaos," characterized by many categories of land ownership and a wide variety of unanswered jurisdictional questions. For example, just to determine jurisdiction in an arrest for criminal activity, both a survey to determine the exact location of the crime and a title search to establish the past and present ownership of the land are often necessary. Issues of civil and criminal jurisdiction are complicated by a history of mistrust and conflict in the area.

Understandably the Tribe feels an obligation to defend the historic boundaries of its Reservation even though substantial portions of the area presently consist of National Forest and lands owned by and almost exclusively populated by non-Indians. Though further litigation on the boundary and jurisdictional issues might provide some additional clarity, at the end of the day a host of practical issues, including water allocation, administration of schools, welfare of children, mental health, arrest authority, taxation, environmental regulation and wildlife management, will likely remain.

The State has not changed its position concerning the merits of the boundary litigation, but has changed its focus from litigation to negotiations. Serious negotiations between the State, Counties and Tribe began in 1994. In 1994 all of the parties signed a Memorandum of Understanding, and the following year they entered into an agreement that provides for the sharing of mineral severance taxes collected by the State from tribal trust and other lands. In 1996 the State and the Tribe signed a cooperative agreement dealing with wildlife management matters and, in September of 1997, a Child Welfare Agreement was executed. Recent discussions which

did not involve the Counties have led to the execution of a Letter of Intent, a copy of which is appended. While this document is just an "agreement to agree," it serves as a useful road map for future negotiations.

With both the State and the Tribe committed to serious negotiations, and having already made some important progress in negotiating difficult issues, the deadline for filing a Petition for a Writ of Certiorari represented a crossroads for the State. After due deliberation, the decision was made not to jeopardize the ongoing negotiations by joining in the Petition. This decision does not represent agreement with the decision of the Tenth Circuit that is the subject of the pending Petition. Rather, it represents the State's best effort to resolve the complex problems confronting the parties.

STATEMENT OF POSITION

For these reasons, the State of Utah takes no position with respect to the Counties' Petition for a Writ of Certiorari.

Respectfully submitted,

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MICHAEL M. QUEALY
Assistant Attorney General
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PHILIP C. PUGSLEY
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Counsel for the State of Utah

December 23, 1997

APPENDIX

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LETTER OF INTENT

The undersigned hereby express their preliminary agreement to certain important principles, and their commitment to work together to settle remaining issues, with the objective of signing one or more agreements resolving important matters that have been troublesome and unresolved for many years.

GENERAL PRINCIPLES

1. The parties express their intention to discontinue litigation and emphasize negotiations as the preferred method of resolving disputes.

As expressed in the Memorandum of Understanding entered into in December of 1994, it is the intent of the parties hereto to pursue dispute resolution through the bargaining process, thereby contributing to a healthy, ongoing government-to-government relationship.

2. The Tribe and State recognize the legitimacy of the desire of Indian and non-Indian residents of the area to be governed by their own institutions and to be free of unnecessary interference by the other.

Major concerns identified by the parties in implementing the recent decision of the Tenth Circuit include a desire by Indians to have misdemeanor arrests on non-Reservation lands heard in Tribal Court, a desire by Indians to be free of certain otherwise applicable state taxes and a desire by non-Indians living on non-Indian fee lands within the Reservation, as defined by the Tenth Circuit, to be free of Tribal regulation.

3. The parties recognize that the effect of the recent decision of the Tenth Circuit has been to create a very difficult situation for law enforcement officers operating in the area and they desire to cooperatively provide a "seamless" system, ensuring that violations of the law are consistently and appropriately handled.

Jurisdictional issues involving law enforcement should not affect the legitimate desire of both Indian and non-Indian residents of the area to have the protection of prompt, fair and efficient law enforcement. A cooperative effort is most likely to bring about that result.

4. It is in the interest of the parties to eliminate conflicting claims to land in order to remove uncertainty and permit the land and resources located thereon to be used to the best advantage.

5. Important shared resources of the area, including water, wildlife resources and freedom from environmental degradation can best be managed on a cooperative basis.

6. A joint effort involving as many governmental parties as possible will have the best chance of arriving at comprehensive, mutually advantageous solutions to longstanding issues and obtaining necessary implementing approvals.

MATTERS WITH RESPECT TO WHICH THERE APPEARS TO BE SUBSTANTIAL AGREEMENT

Having accepted the principles set forth above, the parties have discussed at some length practical steps which can

be taken. There appears to be substantial agreement with respect to the following matters:

A. **End of Boundary Litigation.** Absent a change in controlling law, the parties accept and agree to be bound by the results of the 1997 decision of the Tenth Circuit Court of Appeals in the case of Ute Indian Tribe v. Utah, determining the present extent of the Uintah and Uncompahgre Reservations. However, acceptance of that decision does not necessarily determine the respective rights of Indians and non-Indians within the areas covered by that decision and further negotiations may be necessary to resolve those issues. In addition, the parties reserve the right to pursue litigation as a last resort, if necessary to clarify fundamental rights of residents of the area or the respective jurisdiction of the parties hereto.

B. **Cross-Deputization.** The Tribe, Bureau of Indian Affairs and State will enter into a cross-deputization agreement whereby appropriately-trained peace officers of each jurisdiction will be authorized to effect arrests or issue citations to any person suspected of violating the law on lands subject to the other entity's jurisdiction. Such arrest authority is not intended to give State officers the right to patrol Reservation land off State highways nor is it intended to give Tribal officers the right to patrol non-Reservation lands. Conservation officers who have received appropriate training will be included in the cross-deputization agreement. The parties will study provisions of the "Cooperative Agreement for Mutual Assistance in Law Enforcement" which was entered into in 1988 and will use as much as possible of that Agreement as the basis for a new agreement.

C. **Wildlife Agreement.** The parties entered into a Cooperative Agreement dealing with the management of fish and wildlife in February of 1996. The Agreement is working well and it

should be incorporated by reference in any final agreement between the parties, subject only to arriving at a workable, long-term formula or percentage that could be used in place of the number of limited entry permits on certain hunting units contained in the Cooperative Agreement.

D. Non-Interference. In order to give effect to the desire of Indian and non-Indian residents of the area to be governed by their own institutions and be free of unnecessary interference by the other, the parties agree to continue discussing and work toward agreement in the following areas:

1. Desires of the Tribe:

a. Misdemeanors. The Tribe desires that State officers refer Tribal members who are arrested for committing misdemeanors on lands that have been held to no longer be part of the Uintah Valley Reservation into Tribal Court for disposition. The Tribe understands that the State cannot commit Duchesne and Uintah County officers to do the same and that Roosevelt City is presently unwilling to entertain this idea.

b. Taxation. The Tribe has asked the State to consider alternative ways of dealing with the burden of State income taxes on Tribal members who live and work anywhere within the original exterior boundaries of the Uintah Reservation (excepting the Strawberry Reclamation Project and Gilsonite Strip withdrawals) and the Uncompahgre Reservation. The State is willing to discuss these issues but has pointed out to the Tribe that State income taxes are used to support public schools in the State and that there may be a problem giving such relief as well as supporting the Tribe's desire to have a high school operate under Tribal auspices (discussed below).

The Tribe desires to discuss an arrangement under which portions of the sales tax collected from Tribal members making purchases on lands that have been held to no longer be part of the Uintah Valley Reservation, as well as the sales tax collected from non-members of the Tribe who make purchases on Tribal trust lands, would be remitted to it. Such discussions would, of necessity, include consideration of the exact nature and extent of any such tax relief.

c. New School District. The Tribe desires the support of the State in exploring the possible creation of a school district that covers the western portion of Uintah County. Past discussions of this subject involved the possible transfer to the Tribe by the Uintah School District of all or a portion of the facilities at Todd Elementary/West Middle School for that purpose.

2. Desires of the State:

a. Civil Regulatory Jurisdiction. The State desires that the Tribe disavow regulatory authority (including zoning, licensing and environmental regulation) over land declared to be part of the Reservation under the Tenth Circuit's most recent decision in Ute Indian Tribe v. Utah, 114 F.3d 1513 (10th Cir. 1997) which is owned in fee by non-Indians. In seeking such a disavowal, the State recognizes that the Tribe would assert the right to assert such regulatory authority in those limited circumstances in which the Tribe is able to establish, by clear and convincing evidence, that the conduct sought to be regulated poses a direct threat to the health, safety or welfare of the Tribe or its members.

In addition, the Tribe would assert the right to exercise authority given to it under federal law to deal with the following:

(1) The issuance of Tribal permits to accompany state-issued permits authorizing the sale of alcoholic beverages.

(2) Administrative responsibilities in connection with the management of water which are given to the Tribe under terms of the Ute Water Compact.

(3) Management of hunting and fishing by mixed-bloods to the extent that they have the right to share Tribal hunting and fishing rights.

(4) Subsurface rights held in trust for the Tribe where the surface of the land is held in fee by a non-Indian.

b. Taxation. The State desires a Tribal disavowal of the authority to impose any form of tax, including, but not limited to, an income, sales or use tax, on non-Indians living or conducting business on non-Indian-owned fee lands that are within "Indian country". Such a disavowal would include any authority to collect fees or assessments (e.g. a business activity fee) from the conduct of business by non-Indians on non-Indian-owned fee lands.

E. Land Status. The status of certain lands is such that their full use and benefit is not being enjoyed. The parties desire to work together in solving these problems.

1. State School Lands. The Tribe will not challenge, or attempt to challenge, the State's ownership of those lands

identified as "school selections" within either the Uncompahgre or the Uintah Valley Reservation.

Negotiations will be undertaken with the objective of returning to Tribal ownership those "school selection" lands and mineral interests located within the Hill Creek Extension, and exchanging them for land or other assets having comparable value located outside the Hill Creek Extension.

2. **Hill Creek Minerals.** The State reaffirms the commitment set forth in the 1994 Memorandum of Understanding to work with the Tribe in seeking to obtain for the Tribe subsurface rights in the Hill Creek Extension which were retained by the United States when the surface of the lands was transferred to the Tribe in 1948.

F. **Justice System / Cultural Sensitivity.** The State has asked for certain assurances concerning the Ute Tribal Court in order to have confidence the Tribal members arrested on lands that have been held to no longer be part of the Reservation and referred to Tribal Court will be dealt with appropriately. The Tribe is willing to give such assurances and has asked in return that State law enforcement officers receive cultural sensitivity training to assist them in handling arrests of Tribal members with appropriate consideration for their unique situation.

1. **Ute Tribal Court.** The Tribe agrees to revise its Law and Order Code to provide for penalties equivalent to the penalties imposed for the same offense under State law, to the extent the Tribe is able to do so under the terms of the Indian Civil Rights Act (which limits the maximum penalty that a Tribe may impose to $5,000.00 and one year in jail).

The Tribe will improve its Tribal court system, with the employment of a full-time, law-trained chief judge and a law-trained prosecutor. Every effort will be made to safeguard the independence of the Tribal Court.

2. **Cultural Sensitivity Training**. The State agrees to provide for its law enforcement officers (and make available to officers employed by its political subdivisions in the area) on a regular basis training which includes information on proper protocol to be used in dealing with members of the Tribe, limitations on each officer's jurisdictional and cross-deputization authority, and an appreciation and understanding of matters of cultural importance.

MATTERS THAT HAVE BEEN DISCUSSED THAT REQUIRE FURTHER CONSIDERATION

The following matters have been discussed between the parties and will be further pursued with the objective of settling differences and promoting mutual governmental respect and advancement:

A. Mapping. Discussions are being conducted with BIA, BLM and other federal officials in an effort to produce maps that will be helpful to law enforcement officers and others who need to know the status of lands within the Uintah Basin. These joint efforts will continue on a cooperative basis.

B. Environmental Regulation - Uncompahgre. The Tribe believes that it is in its interest to reasonably assist the State in continuing its past role as the regulator of environmental matters on lands within the Uncompahgre Reservation.

C. **Water Issues.** The Tribe plans to present to the State its views on certain administrative issues under the Ute Water Compact. After receiving the views of the Tribe, the State is willing to consider such views in an effort to resolve matters that have delayed ratification and implementation of either of the two compacts negotiated previously.

D. **Dependent Indian Communities.** The Tribe and State agree to discuss the status of towns possibly qualifying as "dependent Indian communities" and the consequences of being so classified.

E. **Confirmation of Agreements Reached.** The Tribe and State agree to work together on necessary steps to have the agreements that they negotiate confirmed and made enforceable. These steps may include work on a stipulated order to be presented to Judge Jenkins, necessary Tribal and State legislative changes and jointly seeking Congressional approval.

F. **Other Matters.** The Parties have identified other matters that they feel may be appropriate for future joint consideration:

1. **Other Jurisdictional Issues.**

   a. Enforcement of family support orders.

   b. Full faith and credit.

   c. Service of process.

   d. Extradition.

2. **Law Enforcement.**

a. Hot pursuit situations crossing jurisdictional lines.

b. Patrolling roads that cross jurisdictional lines.

c. Matters that are not being dealt with adequately at present e.g. spousal abuse and concerns about the role of the U.S. Attorney in connection with misdemeanors.

3. **Support of Legislation to Eliminate Termination Provisions.** The State is willing to work with the Tribe in seeking the elimination of language in the Ute Partition Act which calls for eventual termination of federal recognition and supervision of the Tribe.

MATTERS TO BE FINALIZED IN SUBSEQUENT AGREEMENTS

The Tribe and the State recognize that the commitments contained herein are preliminary and that final resolution of the matters identified in this Letter of Intent will require substantial discussion and negotiation. As negotiations on each matter are concluded, the parties shall, as appropriate, enter into an agreement(s) which sets forth the final commitments and binding obligations of the State and Tribe or seek ratification of the negotiated settlement by Congress.

By signing below the parties hereto publicly acknowledge their commitment to work cooperatively toward the completion of definitive agreements resolving the important issues set forth above.

UTE INDIAN TRIBE

By_____

STATE OF UTAH

By_____